Supreme Court, U.S.
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No. 92-779

In The

# Supreme Court of the United States

October Term, 1992

CARLTON JOHNSON, et al.,

*Petitioners,*

v.

WEBB THOMPSON, M.D., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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January 8, 1993

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33 pp

## QUESTIONS PRESENTED

Respondent Demps rejects the Petitioners' characterization of questions presented. The questions should be stated as follows:

1. Whether jurisdiction is lacking against the State of Oklahoma's hospital facility receiving federal funds?

A. Whether the trial court's Summary Judgment dated June 27, 1989, denying declaratory and injunctive relief and dismissing "State" officials, has become final and unappealable?

B. Whether petitioners failed to properly designate as Respondents necessary State officials governing Childrens Hospital of Oklahoma?

2. Whether the Petitioners' claims under Section 504 of the Rehabilitation Act of 1973 are moot since Petitioners sought only declaratory and injunctive relief in the trial court?

A. Whether all handicapped newborns hospitalized in "State" owned hospitals have been treated since passage of the Child Abuse Amendments of 1984, P.L. 98-457, 42 U.S.C. §§ 5101-5103?

B. Whether declaratory and injunctive relief is inappropriate?

## QUESTIONS PRESENTED – Continued

3. Whether Petitioners' claim under Section 504 is moot since the only remaining Respondents are physicians who are not employees of the hospital facility receiving federal funds?

4. Whether Section 504 of the Rehabilitation Act is applicable to treatment decisions involving handicapped newborns?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are correctly named. Petitioners sought only injunctive and declaratory relief against the "State" defendants in their official capacities only.

Petitioners expressly excluded as Respondents herein all administrators of the State hospital and all members of the Oklahoma Commission for Human Services which governs the hospital, and two State employees, nurse Tull and Social Worker Tatyrek. Whether by oversight or design, Benjamin Demps, Jr. Director, Oklahoma Department of Human Services, was the only appellee below neither expressly excluded, nor included as a Respondent.

Petitioners sought only declaratory and injunctive relief against Mr. Demps in his official capacity. Mr. Demps' sole involvement, however, was via automatic substitution under Rule 25(d)(1), F.R. Civ.P. for his predecessor in office, Mr. Phil Watson, who, along with all other "State" defendants, was dismissed by the trial court pursuant to partial summary judgment on June 27, 1989.

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CARLTON JOHNSON, et al.,

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

Respondent, Benjamin Demps Jr., respectfully requests that the Petition for Writ of Certiorari to review an order of the Circuit Court of Appeals for the Tenth Circuit be denied.

## OPINIONS BELOW

Opinions and Orders set forth in Petitioners' Appendix (hereinafter, Pet. App.) are accurately reported. Petitioners, however, omitted a critical Order dated June 27, 1989, in which the trial court granted partial summary

judgment, and dismissed Respondent Demps' predecessor in office and all other "State" officials.

## JURISDICTION

Respondent unequivocally asserts that Petitioners have failed to properly invoke this Court's jurisdiction for discretionary review under 28 U.S.C. § 1254(1). In addition to failing to designate certain State officials as necessary Respondents, the Petition herein fails to contest, object, or in any manner present arguments against the factual findings or legal conclusions contained in the trial court Order dated June 27, 1989. That Order was affirmed by the Tenth Circuit (Pet.App., at p. 80, Section C), and dismissed all State officials since declaratory and injunctive relief was inappropriate. Therefore, that Order is final and not subject to discretionary review under Section 1254(1).

## FEDERAL STATUTES AND REGULATIONS INVOLVED

1) The Child Abuse Amendments of 1984, Pub. L. No. 98-457, tit. 1, secs. 121-28, 98 Stat. 1749, 1752-55 (codified originally at 42 U.S.C. §§ 5101-5103), Section 5102(B)(3) of the Amendments has been recodified at Section 5106g(10) and defines "withholding of medically indicated treatment" (Resp.App., at 8)

2) 45 C.F.R. § 1340.15. Services and treatment for disabled infants. (Resp.App., at 9)

## STATEMENT OF THE CASE

The Petitioners' Statement, as contained in the Petition, does not sufficiently elaborate on all relevant court orders or events. This Respondent submits the following Statement relevant to this Court's inquiry into the instant Petition.

1. The district court for the Western District of Oklahoma by Order dated June 27, 1989, granted to some, but not all defendants partial summary judgment. (Resp.App., at 1) The trial court explicitly dismissed Respondent's predecessor in office, all members of the Department's governing body, the Commission for Human Services, and administrators and staff of Oklahoma Childrens Hospital, which is administered by the Commission under 56 O.S. § 338 (Resp.App., at 10-11).

2. The trial court further held that injunctive relief was inappropriate since there was no evidence of ongoing or future harm. Similarly, the trial court exercised its discretion in rejecting declaratory relief in the absence of a live controversy with sufficient immediacy of threat of harm.

3. This ruling was affirmed by the Tenth Circuit Court of Appeals based upon a finding of no abuse discretion. (Pet.App., at 80, Section C)

4. Petitioners have stated that they seek this Court's discretionary review of the trial court's Order dated June 22, 1987, dismissing their claim under Section 504 of the Rehabilitation Act of 1973. The Petition unequivocally states:

> "While numerous other constitutional and state law violations were argued on appeal to the Tenth Circuit, *the only issue before this Court in this Petition for Writ of Certiorari is the dismissal of Petitioners' claims under § 504 . . .* " (emphasis added)

Petition, at 7. Petitioners, however, failed to present any arguments against the trial court's partial summary judgment denying injunctive and declaratory relief, or object to the dismissal of all State officials including Respondent's predecessor in office. This oversight is fatal since the denial of injunctive and declaratory relief was rendered regardless of a valid Section 504 claim. Moreover, Petitioners failed to object to the Tenth Circuit's affirmance of that ruling. Petitioners additionally failed to include the partial summary judgment in their appendix. Therefore, the Order has become final, and not subject to discretionary review under 28 U.S.C. § 1254(1).

5. Petitioners sought only declaratory and injunctive relief against Respondent Demps, his predecessors in office, members of the Commission, and administrators and two staff employees of Childrens' Hospital of Oklahoma.

6. Petitioners explicitly excluded as respondents state hospital administrators and employees, and most importantly, members of the Oklahoma Commission for Human Services. (*See* Petition, "List of Parties," at ii-iii.) The Commission governs not only the Department of Human Services (DHS), but also Childrens' Hospital of Oklahoma. Art. XXV, §§ 3 and 4, Okla. Const.; 56 O.S. § 338 (Resp.App., at 10-11)

Respondent Demps submits that the members of the Commission are necessary parties. Budgetary and policy making decisions are the responsibility of the Commission under Article XXV, Section 4. For purposes of clarification, co-respondent physicians are not employees of this Respondent, Childrens' Hospital of Oklahoma, DHS or the Commission. Even if petitioners had properly appealed from the June 27, 1989 partial summary judgment, they failed to invoke this Court's discretionary jurisdiction by designating necessary State officials as Respondents herein.

7. Petitioners' Section 504 claim is moot. First, the trial court appropriately denied injunctive and declaratory relief against Respondents' predecessor and all other State officials and hospital employees. The findings of the trial court indicated that all seriously ill infants had been medically treated since 1984, and that there was no evidence of ongoing harm or risk of future discrimination. Respondent and other State officials successfully argued that medical treatment was provided pursuant to the Child Abuse Amendments of 1984. (Resp.App., at 8)

Petitioners have failed to contest or present arguments against these evidentiary findings and legal conclusions which were affirmed by the Tenth Circuit Court of Appeals. Petitioners' claims against this Respondent are moot, and a Writ of Certiorari should be denied.

8. Discretionary review is inappropriate since the co-respondent physicians do not receive federal funds as required under Section 504. As noted previously, the physicians were not employees of this Respondent or Childrens' Hospital of Oklahoma. The State administered

hospital was the sole entity receiving federal reimbursement. In view of the lack of jurisdiction and mootness of claims against Respondent Demps, petitioners are precluded from pursuing a Section 504 claim against co-respondent individual physicians who are not employed by the facility receiving federal funding.

9. There is no decision of this Court, or any circuit, that has held Section 504 applicable to treatment decisions of seriously ill newborns in the absence of parental consent. The decisions of the trial court and Tenth Circuit Court of Appeals do not present important questions of federal law requiring discretionary review.

## THE COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

The petitioners' claim for injunctive and declaratory relief against Respondent's predecessor in office was appropriately denied. Partial summary judgment was proper under Rule 56(d). *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). That ruling was subsequently affirmed by the Tenth Circuit Court of appeals. (Pet.App., at 80, Section C) The instant Petition should be denied.

## I. THIS COURT LACKS JURISDICTION TO ISSUE A WRIT OF CERTIORARI

### A. THE TRIAL COURT ORDER DATED JUNE 27, 1989, GRANTING STATE OFFICIALS (INCLUDING RESPONDENTS' PREDECESSOR) SUMMARY JUDGMENT WAS NOT CONTESTED OR DESIGNATED AS PART OF THIS PETITION, AND, THEREFORE, HAS BECOME FINAL, AND NOT SUBJECT TO DISCRETIONARY REVIEW.

By Order dated June 27, 1989, Respondent Demps's predecessor in office, along with all other State officials, was granted partial summary judgment. The trial court denied petitioners' claim for injunctive and declaratory relief, and dismissed the State officials and two hospital employees from the suit.

The district court explicitly held that there was no evidence whatsoever of ongoing harm or significant risk of discriminatory conduct in the future. *City of Los Angeles v. Lyons,* 103 S.Ct. 1660, 1668-1670 (1983). Noting plaintiffs' failure to produce any evidence, the district court found that all seriously ill infants had been appropriately treated since 1984. Defendants had argued that treatment of all seriously ill infants commenced with passage of the Child Abuse Amendments of 1984, 42 U.S.C. § 5102(B)(3) (recodified at Section 5106g(10)). (Resp.App., at 8) The implementing regulation is contained in 45 C.F.R. § 1340.15. (Resp.App., at 9)

The district court also denied declaratory relief since there was no evidence of a problem of significant immediacy of future harm. (Resp.App., at 4-6) The same arguments were presented to the appellate court which

affirmed the denial of injunctive and declaratory relief. (Pet.App., at 80, Section C) Petitioners herein have utterly failed to object, contest, or present arguments against either the trial court's partial summary judgment, or the decision to affirm. Consequently, that decision is final and not appropriate for discretionary review under 28 U.S.C. § 1254(1).

Petitioners have explicitly restricted their Petition "only" to review of the dismissal of their claim under Section 504 of the Rehabilitation Act of 1973. Petition, at 7. The failure to contest findings of fact and conclusions of law are fatal to any attempt to resurrect those issues after the deadline for filing the petition herein.

The 1989 partial summary judgment was rendered essentially upon the petitioners' failure to produce evidence of harm after 1984. Therefore, the ruling was correct in denying injunctive and declaratory relief in the absence of ongoing harm regardless of whether the Section 504 claim had been dismissed or not. Further, there was no live controversy or case affording jurisdiction for injunctive relief. *O'Shea v. Littleton*, 414 U.S. 488, 95 S.Ct. 669 (1974).

### B. PETITIONERS FAILED TO PROPERLY DESIGNATE AS RESPONDENTS NECESSARY STATE OFFICIALS GOVERNING CHILDRENS HOSPITAL OF OKLAHOMA.

In the petitioners' "List of Parties," all State officials and hospital administrators were expressly excluded as respondents herein. Respondent Demps was neither excluded or included. Whether due to oversight or by

design, Respondent Demps submits that failure to include members of the Oklahoma Commission for Human Services defeats jurisdiction over the State owned and administered hospital. This is also important since the hospital is the only entity receiving federal funds, a prerequisite to a claim under Section 504.

The Commission, not Respondent Demps as Director of the Department of Human Services, governs the Department and Childrens Hospital of Oklahoma. Art. XXV, §§ 3 and 4, Okla. Const. and 56 O.S. § 338, respectively. (Resp.App., at 10-11) The Commission is a necessary party.

Under the above provisions, the Commission is the sole and exclusive body ultimately responsible for hiring, firing, budgets, and policymaking as it affects the hospital. Even if petitioners had properly sought review of the partial summary judgment, they have failed to seek relief against the governing body responsible for hospital policy and practice. Discretionary review is inappropriate on this basis alone.

## II. PETITIONERS' CLAIM UNDER § 504 OF THE REHABILITATION ACT OF 1973 IS MOOT.

### A. THIS TRIAL COURT CORRECTLY DENIED DECLARATORY AND INJUNCTIVE RELIEF SINCE ALL HANDICAPPED NEWBORNS HAVE BEEN TREATED APPROPRIATELY SINCE PASSAGE OF THE CHILD ABUSE AMENDMENTS OF 1984.

The trial court held in 1989 that declaratory and injunctive relief were inappropriate as a matter of law.

Notwithstanding the dismissal of petitioners' Section 504 claim in 1987, the subsequent denial of relief was premised upon no evidence of ongoing harm or risk of future discriminatory conduct. (Resp.App., at 3) Since no monetary damages were sought against the Respondent or other State officials or administrators, petitioners' Section 504 claim is moot. Petitioners sought monetary damages only from physicians who were not employees of Respondent, the Department, Commission, or the hospital.

Petitioners' failure to contest the findings or conclusions of the trial court or appellate tribunal concerning denial of injunctive and declaratory relief further underscores mootness of the Section 504 claim. Petitioners cannot rewrite their petition to circumvent mootness resulting from nonappealed evidentiary and legal rulings below.

### B. PETITIONERS' SECTION 504 CLAIM IS ADDITIONALLY MOOT SINCE THE ONLY REMAINING RESPONDENTS ARE PHYSICIANS WHO ARE NOT EMPLOYEES OF STATE HOSPITALS AND WHO DO NOT RECEIVE FEDERAL FUNDING.

Petitioners have assumed throughout this litigation, but never pleaded, that co-respondent physicians were employees of Childrens' Hospital of Oklahoma. Conversely, Respondent Demps has argued consistently that none of the physicians are employees of this Respondent.

In addition to the lack of jurisdiction for, and mootness of, Section 504 claims against Respondent Demps, petitioners' separate Section 504 claim cannot be pursued

against individual physicians who are not employees of the hospital entity receiving federal funding. Childrens Hospital of Oklahoma received the federal Medicaid funds for treatment of patients. 56 O.S. § 338 (last sentence). Not only were physicians not employees, but they could not receive the Medicaid monies under Title XIX. *United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606-07, 106 S.Ct. 2705, 2711 (1986). No relief can be granted against the physicians. The Petition should be dismissed in its entirety due to mootness against all respondents.

## III. CONGRESS DID NOT INTEND, NOR HAS ANY COURT HELD, SECTION 504 TO APPLY TO TREATMENT DECISIONS BY PHYSICIANS WITHOUT PARENTAL CONSENT.

Congress did not intend that Section 504 would apply to treatment decisions of infants. Indeed, this Court in a plurality decision rejected a Final Rule enacted in January, 1984 ostensibly under Section 504. *Bowen v. American Hospital Assn.*, 476 U.S. 610, 106 S.Ct. 2101 (1986). In *Bowen*, this Court stated in relevant part that prior to 1984:

> "The Federal government was not a participant in the process of making treatment decisions for newborn infants. *We presume that this general framework was familiar to Congress when it enacted § 504.*" Id. at 2113.

The law prior to 1984 did not authorize enforcement of Section 504 for discrimination in treatment decisions. Moreover, the Secretary of HHS conceded that even under its Final Rule, hospitals had no mandatory treatment

obligation under Section 504 absent parental consent. Id. at 2114. The events and allegations in the instant Petition transpired between 1978 and 1982. Neither legislative history, nor decisional law applied Section 504 to treatment decisions during the period in question or the present time.

Although this Court in *Bowen* struck down the Final Rule for many reasons, it noted with approval the Preamble to the Rule at issue:

> "When a non-treatment decision, no matter how discriminatory, is made by parents, rather than the hospital, Section 504 does not mandate that the hospital unilaterally overrule the parental decision and provide treatment notwithstanding the lack of consent." 49 Fed. Reg. 1631 (1984)

Id. at 2114. The parents here decided on non-treatment.

This question was initially discussed beginning with *American Academy of Pediatrics, et al. v. Heckler*, 561 F.Supp. 395 (D.D.C. 1983). There, the district court struck down an Interim Final Rule which proscribed withholding of treatment under Section 504. That court noted that traditionally such treatment decisions were made within the privacy of the physician-patient relationship, unfettered by federal interference. Id. at 396.

The *American Academy* opinion noted that such decisions had always involved joint decisionmaking by parents and physicians. Indeed, it was observed that the Interim Final Rule was "intended to change the course of medical decisionmaking . . . eliminating the right of parents to refuse to consent to treatment." Id. at 401. Thus, Section 504 had not previously been applied and was not

the "law" prior to 1983 when petitioners' claims allegedly arose. The court cogently held:

> " . . . no congressional committee or member of the House or Senate ever even suggested that Section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life."

Id. at 401. The above language demonstrates that Section 504 was not well settled law prior to 1984.

The Second Circuit also rejected HHS Final Rules under Section 504. *United States v. University Hospital, State University of New York*, 725 F.2nd 144 (2d Cir. 1984). The court there further held that:

> "[C]ongress never contemplated that Section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborn infants when the Statute was enacted in 1973, when it was amended in 1974, or at any subsequent time.

Id. at 161. Indeed, no "witness even remotely" suggested treatment decisions of infants was governed by Section 504. Id. at 158-59. Petitioners' arguments pertaining to Section 504 are not based upon legislative history or case precedent. Equally important, injunctive and declaratory relief are not available under Section 504 for alleged events between 1978 and 1982. The Petition presents no questions of great national significance or conflict among the circuits warranting discretionary review.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| CARLTON JOHNSON by SHARON JOHNSON, as his next friend, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. CIV-85-2434-A |
| RICHARD H. GROSS, M.D., in his individual capacity, et al., | ) | |
| Defendants. | ) | |

ORDER

Before the Court in this case is defendants' joint motion for partial summary judgment. Defendants seek partial summary judgment under Fed. R. Civ. P. 56(d) on plaintiffs' claims for injunctive and declaratory relief on the ground that the discriminatory practices of which plaintiffs complain do not represent an ongoing harm, and are incapable of repetition. The defendants against whom only injunctive and declaratory relief is sought also seek dismissal from this action.

Plaintiffs bring this action both on their own behalf and on behalf of all children with myelomeningocele who have been, are, or may in the future be evaluated or treated by the myelomeningocele team or its members at Oklahoma Children's Memorial Hospital (OCMH), and on behalf of their parents and legal guardians. Amended Complaint, p. 6, para. 32. Plaintiffs allege that defendants, medical service providers and administrators at

OCMH, and others, discriminate against infants born with myelomeningocele by basing treatment decisions on non-medical social and economic criteria, such as the family's economic and intellectual resources, geographic location of their home, and the child's projected intellectual capacity. Plaintiffs allege that the use of such criteria constitutes discrimination in violation of their substantive and procedural due process rights, and rights to equal protection under the Fourteenth Amendment. Causes of action 1-8 of plaintiffs' First Amended Complaint seek declaratory and injunctive relief, as well as monetary damages. These causes of action pray that the Court both declare that defendants have engaged in unlawful conduct and also enjoin defendants from further engaging in such conduct.

(1) Injunctive Relief

A claim for injunctive relief is appropriate only where a plaintiff demonstrates that he faces a risk of continuing harm. Evidence of past injury along is insufficient to warrant an injunction. *Palmer v. City of Chicago*, 755 F.2d 560, 572 (7th Cir. 1985); *O'Shea v. Littleton*, 94 S.Ct. 669, 676 (1974). In addition, to maintain a claim for injunctive relief a plaintiff must show more than a mere speculative or theoretical possibility of future harm. There must be some realistic likelihood that the alleged past harm will be repeated. *City of Los Angeles v. Lyons*, 103 S.Ct. 1660, 1668-1670 (1983).

The Court finds that plaintiffs have failed to show any more than a speculative possibility of future discriminatory treatment by defendants, either with respect to the

named plaintiffs, or with respect to present and future infants with myelomeningocele who will be evaluated by defendants. Although this case has been pending over three years, and extensive discovery has been conducted, plaintiffs have produced no evidence that defendants have engaged in any selective discriminatory treatment of newborns since 1984. On the contrary, the undisputed evidence submitted by defendants reveals that all newborns under defendants' care since 1984, with the exception of one for whom surgical treatment would have been futile, have received aggressive treatment. *See* Summary of Defendants' Answers to Interrogatory No. 19, Exhibit 3, Defendants' Motion. This evidence strongly suggests that any unlawful discrimination practiced by defendants has long since ceased. Reasonable jurors could not find that defendants pose a risk of continuing harm to children with myelomeningocele presenting at OCMH. Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Celotex Coro. v. Catrett*, 91 L.Ed.2d 265, (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986).

Plaintiffs' argument in support of their proposition that a factual issue exists as to whether discriminatory medical treatment is ongoing is unpersuasive. Plaintiffs rely on deposition testimony by Cara Madison, Cheparney Camp, and Frieda Smith, relatives of the infant plaintiffs in this case, that, prior to the filing of this action, defendants denied them any real choice as to treatment of their children. This evidence, however, relates only to defendants' past conduct at the time

defendants were evaluating the named plaintiff infants. It does not constitute evidence of any existing or future threat of unlawful conduct for which an injunction might lie.

With respect to the risk of future harm to the named plaintiffs in this case, both Melissa Camp and Stonewall J. Smith are deceased. Injunctive relief as to them is therefore clearly in appropriate. Carlton Johnson, however, is surviving and remains an outpatient at OCMH. Although Carlton Johnson has been under defendants' care since his birth in September 1982, plaintiffs have produced no evidence of discriminatory medical treatment of him since October, 1982. Plaintiffs' evidence of a continuing threat of harm to Carlton Johnson consists entirely of unsubstantiated and inadmissible statements of opinion, not based on personal knowledge, by Sharon Johnson, Carlton Johnson's mother. Plaintiffs' Response Brief, p. 10-11. Such statements are not competent evidence for resisting summary judgment on defendants' claims for injunctive relief. Based on the evidence before the Court, reasonable jurors could not find that Carlton Johnson presently faces a realistic likelihood of future discriminatory treatment by defendants.

(2) Declaratory Relief

Having resolved the injunctive relief issue, we now turn to plaintiffs' claims for declaratory relief. The Declaratory Judgment Act is enabling act, which confers a discretion on the court, rather than an absolute right on the litigant. *Green v. Mansour*, 88 L.Ed.2d 371, 379 (1985); *Public Service Comm. v. Wycoff Co.*, 73 S.Ct. 236, 239 (1952).

The Court in its discretion declines jurisdiction over plaintiffs' declaratory relief claims for several reasons. First, declaratory relief is appropriate only where the facts show "a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 85 L.Ed. 826, 829 (1941). As seen above in our discussion of injunctive relief, plaintiffs have failed to show that their controversy retains a quality of immediacy due to an imminent threat of harm.

Second, the declaratory judgment remedy is ordinarily limited to cases where the rights to be protected have not yet been invaded, or where the wrongs to be prevented not yet committed to the extent of actionable damage. Where the wrongful acts complained of have already been committed and the cause of action already exists, declaratory relief will not lie. 26 C.J.S. Declaratory Judgments § (1956); *Cincinnati Shoe Mfg. Co. v. Vigorith*, 212 F.2d 583 (6th Cir. 1954). Plaintiffs in this case are complaining that their rights have already been violated by wrongful acts already committed by defendants.

Third, a declaratory judgment proceeding is primarily intended to construe the meaning of a law, not to determine the existence of controverted facts. A court should ordinarily refuse a declaratory judgment which can be made only after a judicial investigation of disputed facts. *United Mine Workers of America v. Roncco*, 314 F.2d 186 (10th Cir. 1963), *on remand*, 232 F.Supp. 865 (D. Wyo. 1964); *Allstate Ins. Co. v. Philip Leasing Co.*, 214 F.Supp. 273, 276 (W.D. So. Dakota 1963). The present case will turn largely on questions of fact to be resolved at trial. A crucial fact question is whether defendants in fact

applied discriminatory criteria in selecting infants for beneficial treatment. Such fact questions make declaratory relief inappropriate in this case.

Finally, the declaratory judgment remedy is ordinarily not appropriate where another equally or more important remedy is already available for the issues or rights sought to be determined or declared. *Employers' Liability Assurance Corp. v. Mitchell,* 211 F.2d 441, 443 (5th Cir. 1954). This is particularly so where the case is already ripe for relief by such remedy. *Dresser Industries. Inc. v. Insurance Co. of No. America,* 358 F.Supp. 327, 330 (N.D. Tex 1973), *aff'd,* 475 F.2d 1402 (5th Cir. 1973). Plaintiffs have a fully adequate remedy for their alleged wrongs in their claim for monetary damages. The existence of this remedy makes declaratory relief unnecessary in this case.

## Conclusion

For the above stated reasons, defendants are hereby granted summary judgment on plaintiffs' claims for injunctive and declaratory relief. Fed. R. Civ. P. 56(d). Consequently, those defendants against whom only injunctive or declaratory is sought, defendants Reginald Barnes, William Barnes, Chandler, Coussons, Doenitz, Eaton, Farhas, Furr, Greer, Hargis, Harris, Hartley, Kidd, Orr, Padilla, Stafford, Sullivan, Tatyrek, Toule, Tull, Walters, Watson, Yngve, and Children's Shelter, Inc. are hereby DISMISSED WITH PREJUDICE from this action.

Remaining for trial in this case are plaintiffs' claims for monetary damages against defendants Craig, Gross, Herbeck, Houdesheldt, Livington, Morris, Olson, Pratt, Razook, Stuemky, and Thompson.

It is so ordered this 27th day of June, 1989.

WAYNE E. ALLEY
United States District Judge
(Entered in judgment docket
on 6-27-89)

42 U.S.C. § 5106g (10)

§ 5106g. Definitions

* * *

(10) the term "withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's or physicians' reasonable medical judgment –

(A) the infant is chronically and irreversibly comatose;

(B) the provision of such treatment would –

(i) merely prolong dying;

(ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

(iii) otherwise be futile in terms of the survival of the infant; or

(C) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

## 45 C.F.R. § 1340.15

§ 1340.15 Services and treatment for disabled infants.

* * *

(2) The term "withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's (or physicians') reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's (or physicians') reasonable medical judgments any of the following circumstances apply:

(i) The infant is chronically and irreversibly comatose;

(ii) The provision of such treatment would merely prolong dying, not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or otherwise be futile in terms of the survival of the infant; or

(iii) The provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

## Article XXV, §§ 3 and 4
## Oklahoma Constitution

§ 3. Oklahoma Public Welfare Commission

The Department of a public Welfare shall be under the control of a commission to be known as the Oklahoma Public Welfare Commission,

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§ 4. Director of Public Welfare

It shall be the duty of the Commission to select a Director of Public Welfare,

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The Commission shall formulate the policies, and adopt rules and regulations for the effective administration of the duties of the Department. All executive and administrative duties and responsibilities of the Department shall be discharged by the Director, subject to the approval of the Commission.

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## 56 O.S. § 338

§ 338. Operation of hospital

The Department of Human Services shall operate and maintain the Children's Hospital of Oklahoma as a hospital and service institution for persons under twenty-one (21) years of age, *pursuant to regulations prescribed by the Oklahoma Commission for Human Services,* which shall

establish policies for charges and payments for services provided by the hospital to public and private agencies and organizations and individuals. . . . The hospital may provide services and receive payments therefore under Title XVIII and XIX of the Federal Social Security Act,

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